

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALEX ANTHONY RUBIO,

Petitioner,

v.

ROSEMARY NDOH,

Respondent.

Case No. 1:20-cv-00085-JDP

ORDER DISMISSING PETITIONER'S
REQUEST FOR A STAY AND ABEYANCE
AS MOOT

ECF No. 2

ORDER VACATING FEBRUARY 24, 2020
FINDINGS AND RECOMMENDATIONS

ECF No. 4

ORDER REQUIRING RESPONSE TO
PETITION FOR WRIT OF HABEAS
CORPUS, SETTING BRIEFING SCHEDULE,
AND DIRECTING SERVICE OF
DOCUMENTS

ECF No. 1

Alex Anthony Rubio, a state prisoner without counsel, petitioned for a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. He raised two claims of trial court error and provided evidence confirming that his claims were exhausted at the state level, as required by § 2254(b). *See id.* at 49-75. Petitioner then moved, in a separate motion, for a stay and abeyance of his petition to exhaust state-level remedies for an additional claim of ineffective assistance of counsel. ECF No. 2. On February 24, 2020, we issued findings and recommendations to grant

petitioner's motion to stay and hold in abeyance his petition. ECF No. 4. We informed petitioner that if he were to choose to forego the stay and abeyance of his petition, he will proceed with his original petition. *See* ECF Nos. 4, 6. On April 23, 2020, petitioner notified the court that he wishes to withdraw his request for a stay and abeyance. ECF No. 7. Accordingly, we will dismiss petitioner's request for a stay and abeyance as moot, ECF No. 2; vacate our February 24, 2020 findings and recommendations, ECF No. 4; and proceed with a preliminary review of petitioner's original petition, ECF No. 1.

Under Rule 4 of the Rules Governing Section 2254 Cases, the court must examine the habeas corpus petition and order a response to the petition unless it "plainly appears" that the petitioner is not entitled to relief. It does not plainly appear that petitioner is not entitled to relief. Therefore, we order the government to respond to the petition, set a briefing schedule, and direct service of documents.

Order

1. Petitioner's request for a stay and abeyance is dismissed as moot. ECF No. 2.
2. The February 24, 2020 findings and recommendations are vacated. ECF No. 4.
3. Within sixty days of the date of service of this order, respondent must file a response to the petition.
4. A response may be one of the following:
 - A. An answer addressing the merits of the petition. Any argument by respondent that petitioner has procedurally defaulted a claim must be raised in the answer, which must also address the merits of petitioner's claims.
 - B. A motion to dismiss the petition.
5. Within sixty days of the date of service of this order, respondent must file all transcripts and other documents necessary for resolving the issues presented in the petition. *See* R. Governing Section 2254 Cases 5(c).
6. If respondent files an answer to the petition, petitioner may file a traverse within thirty days of the date of service of respondent's answer. If no traverse is filed within thirty days, the petition and answer are deemed submitted.

7. If respondent moves to dismiss, petitioner must file an opposition or statement of non-opposition within twenty-one days of the date of service of respondent's motion. Any reply to an opposition to the motion to dismiss must be filed within seven days after the opposition is served. The motion to dismiss will be considered submitted twenty-eight days after the service of the motion or when the reply is filed, whichever comes first. *See* Local Rule 230(l).

8. Respondent must complete and return to the court within thirty days a form stating whether respondent consents or declines to consent to the jurisdiction of a United States Magistrate Judge under 28 U.S.C. § 636(c)(1).

9. The clerk of the court is directed to serve a copy of this order on the state attorney general or the attorney general's representative.

IT IS SO ORDERED.

Dated: April 28, 2020

Jeremy Peterson
UNITED STATES MAGISTRATE JUDGE

No. 206.